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Article 21

Sales - Breach of Implied Warranties under the Uniform Commercial Code 2-318 - Miller v. Chrysler Corporation, 183 N.E.2d 421 (Ohio 1962)

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exhausted gas field. Defendant also held rights in an adjoining field, and when it commenced storing gas therein, the pressure in the first field greatly increased making it evident for the first time that the two fields were in fact connected. Defendant then restricted production of gas from the field in which plaintiff held rights, and plaintiff brought this suit for an accounting and injunction restraining artificial restriction of the production of gas from the first field. The court rejected the analogy to animals *ferae naturae* and held title to natural gas is not lost by the injection of such gas into a natural underground reservoir for storage purposes.

The interest of the public in the maintenance of such reservoirs is evidenced by statutes in eleven states providing for condemnation of exhausted gas fields by natural gas utilities,[20] in addition to the statutes in three states rejecting the *Hammonds* doctrine.[21] These laws enable a natural gas public utility to better provide for the seasonal demands for its product by storing reserve gas during the warm months.

The decision in the principal case indicates a definite trend from the *Hammonds* doctrine when considered with the statutes rejecting the doctrine and the decision in the *White* case. The trend appears sound from the viewpoint of public policy and scientific knowledge. The analogy to the "fanciful fox" has been discarded, and a rule based on sound principles of property law has been supplied in its place. The result indicates a sound re-evaluation of this field of law.

[20] COLO. REV. STAT. ANN. ch. 100, §§ 100-9-1–100-9-7 (1953); ILL. REV. STAT. ch. 104, §§ 104-112 (1961); KAN. GEN. STAT. ANN. ch. 55, §§ 55-120100055-1206 (Supp. 1959); KY. REV. STAT. ch. 278, § 278.501 (1955); MICH. STAT. ANN. ch. 230, § 22.1672 (Supp. 1959); MO. REV. STAT. ch. 393, §§ 393.410–393.510 (1959); MONT. REV. CODES ANN. tit. 60, §§ 60-801–60-805 (Supp. 1957); NEB. REV. STAT. ch. 57, §§ 57.601–57.607 (Cum. Supp. 1959); OKLA. STAT. ANN. tit. 52, §§ 36.1–36.7 (Supp. 1960); PA. STAT. tit. 52 § 2401 (Supp. 1960); W. VA. CODE ANN. ch. 54, § 5362 (2) (c) (1961).

[21] *Supra* note 4.

SALES–BREACH OF IMPLIED WARRANTIES UNDER THE UNIFORM COMMERCIAL CODE § 2-318

Plaintiff was employed as a truck driver by the Keal Driveaway Company. While he was delivering a new truck which had been manufactured by the defendant, the brakes on the truck suddenly locked causing it to overturn, resulting in injuries to the plaintiff. An action was brought for personal injuries based on negligence and implied warranty. The trial court dismissed the action upon plaintiff's failure to plead further after the court had sustained a motion requiring the plaintiff to allege facts in his second cause of action (breach of implied warranty) showing privity of contract between plaintiff and defendant. On appeal the Court of Ap-

peals of Ohio held that plaintiff could not maintain an action on the theory of implied warranty because of lack of privity of contract, but it was error to also dismiss the first cause of action based on negligence. *Miller v. Chrysler Corporation*, 183 N.E. 2d 421 (Court of Appeals of Ohio, 1962).[1]

In the English case of *Winterbottom v. Wright*[2] the so-called "general rule" was formulated that in actions based on breach of implied warranty there must be a showing of privity of contract between the plaintiff and defendant.[3] The American courts quickly adopted this rule and it was not until *Thomas v. Winchester*[4] that the first exception to it was recognized in all cases of products which are "inherently dangerous."[5] Later, in *MacPherson v. Buick Motor Co.*,[6] the "imminently dangerous" exception was formulated.[7] Early in this century a third exception was grafted onto the privity requirement when the courts recognized the manufacturers of food products intended for human consumption should be held strictly liable to ultimate consumers for injuries caused by their negligence.[8] In many states the courts have recognized other exceptions to the privity requirement where there has been fraud and misrepresentation on the part of the manufacturer,[9] and where the manufacturer, through his negligence, violates a statute intended for the public welfare.[10]

Recently, a total of eleven states which previously recognized the ex-

[1] *Contra:* Thrash v. U-Drive-It Co., 158 Ohio St. 465, 110 N.E. 2d 419 (1953). Here the court held that an automobile is an imminently dangerous product which falls under an exception to the privity requirement.

[2] 10 Mees & W 109, 152 Eng. Reprint 402 (1842).

[3] Russell v. Sessions Clock Co., 119 Conn. Supp. 425, 116 A. 2d 575 (1955).

[4] 6 N.Y. 397 (1852).

[5] Plaintiff recovered from the manufacturer for injuries sustained from using a jar of belladonna which had been labeled "dandelion." The manufacturer sold to a druggist who sold to plaintiff. Although there was no privity between plaintiff and the manufacturer, the court imposed strict liability because the nature of the article was such as to create a risk of harm to users no matter how much care was used in its manufacture.

[6] 217 N.Y. 382, 111 N.E. 1050 (1916).

[7] The court held that the absence of privity rule applies to products that although not dangerous by nature, are reasonably certain to place life and limb in peril when negligently made.

[8] For example: Cook v. Safeway Stores, Inc., 330 P. 2d 375 (1958, Okla.); Sharpe v. Danville Coca-Cola Bottling Co., 9 Ill. App. 2d 175, 132 N.E. 2d 442 (1956); Mahoney v. Shaker Square Beverages, Inc., 46 Ohio OPS 250, 102 N.E. 2d 281 (1951); Minutilla v. Providence Ice Cream Co., 50 R.I. 43, 144 Atl. 884 (1929).

[9] For example: Day v. Barber-Colman Co., 10 Ill. App. 2d 494, 135 N.E. 2d 231 (1956); Roberts v. Anheuser-Busch Brewing Assn., 211 Mass. 449, 98 N.E. 95 (1912).

[10] Spencer v. Bolt, 82 Okla. 280, 200 Pac. 187 (1921).

ceptions to the "general rule" repudiated the privity requirement in toto.[11] These states follow today what has aptly been called the "enlightened view." Thus, in *Spence v. Three Rivers Builders and Masonry Supply, Inc.*,[12] where the Supreme Court of Michigan repudiated the old rule, the court denounced it in these words:

> American courts quickly fell upon the dictum in an 1842 English case (the Winterbottom case)[13] to relieve manufacturers of all liability, then grafted upon it a bizarre cluster of 'exceptions,' which wondrously grew and grew, until, in all truth—much like the boa constrictor swallowing itself—the exceptions swallowed the rule.

Again, in the Montana case of *Larson v. U.S. Rubber Co.*,[14] the Federal District Court applied the "enlightened view" in allowing the plaintiff to recover in the absence of privity with the manufacturer for these reasons:

> Modern mass-production manufacturers produce their product with the ultimate user in mind, and not for the use of the jobber or retailer who may be in privity with the manufacturer, and the application of the law of negligence will work no hardship in manufacturers, since, unless all of the elements of negligence are present, there can be no recovery against the manufacturer.

The Uniform Commercial Code deals with manufacturers' liability and privity of contract in § 2-318. The pertinent portion of the section reads:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such a person may use, consume or be affected by the goods and who is injured in person by breach of the warranty, . . .[15]

As of June 1, 1962, a total of eighteen states have adopted the Uniform Commercial Code.[16] The minor language changes in § 2-318 as adopted in different states have not gone to the substance of the section. It would seem that this section solves the whole problem of privity because it ex-

[11] State Farm Mutual Automobile Insurance Co. v. Anderson-Weber, Inc., 252 Ia. 1289, 110 N.W. 2d 449 (1961); Atkins v. Jones and Laughlin Steel Corp., 258 Minn. 571, 104 N.W. 2d 888 (1960); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A. 2d 69 (1960); General Motors Corporation v. Dodson, 338 S.W. 2d 655 (Tenn., 1960); B. F. Goodrich v. Hammond, 269 F. 2d 501 (10th Cir. 1959); Jarnot v. Ford Motor Company, 191 Pa. Super. 422, 156 A. 2d 568 (1959); Smith v. Atco Co., 6 Wis. 2d 371, 94 N.W. 2d 597 (1959); Larson v. U.S. Rubber Co., 163 F. Supp. 327 (1958); Babylon v. Scruton, 215 Md. 229, 138 A. 2d 375 (1958); Spence v. Three Rivers Builders and Masonry Supply, Inc., 353 Mich. 120, 90 N.W. 2d 873 (1958); G. Bernd Co. v. Rahn, 94 Ga. App. 713, 96 S.E. 2d 185 (1956).

[12] 353 Mich. 120, 90 N.W. 2d 873 (1958).

[13] Winterbottom v. Wright, 10 Mees & W 109, 152 Eng. Reprint 402 (1842).

[14] 163 F. Supp. 327 (1958).

[15] ILL. REV. STAT. ch. 26, §§ 1-101 to 10-104.

[16] U.L.A.: U.C.C. Art. 1-3-c.

tends manufacturers' liability to all persons in the distributive chain. However, the Committee Comments in § 2-318 neither reinforce nor discourage this view. The Committee maintains that this section is "neutral" and not intended to enlarge or restrict the developing case law on whether the seller's warranty, given to his buyer who resells, extends to other persons in the distributive chain.

In the cases in which plaintiffs have contended that § 2-318 extends manufacturers' liability to all persons in the distributive chain, the courts have uniformly held that the section extends implied warranties *only* to the buyer's household and guests. Therefore, what the courts have succeeded in doing is to limit the scope of § 2-318 by holding that it grafts onto the "general rule" another exception and does not abolish the privity requirement except in this one instance. This exception may be stated in the following manner: If a person suffers injury from a product and is a guest or member of the household of the buyer, he may maintain an action for breach of implied warranty against the seller in the absence of privity of contract. Thus, in *Facciolo Paving & Construction Company v. Road Machinery, Inc.*,[17] the Pennsylvania court spoke of § 2-318 as not changing existing case law which requires privity of contract between the parties in order to extend the seller's warranties to other persons in the distributive chain. This case was decided several months before *Jarnot v. Ford Motor Company*,[18] in which the Supreme Court of Pennsylvania held that the requirement of privity was no longer necessary when suing for breach of implied warranty based in personal injuries. However, the plaintiff who was claiming under § 2-318 in *Kaczmarkiewicz v. J. A. Williams Co.*,[19] was denied recovery on the basis of breach of implied warranty for injuries sustained when the ladder that her employer purchased from a retailer collapsed. The court was of the opinion that an allegation of privity was necessary for the plaintiff to maintain an action for breach of implied warranty against the wholesaler who sold the retailer. It, therefore, seems that the Pennsylvania courts have not rejected the privity requirement in toto, and are not going to reject it, in the near future, on the basis of § 2-318.[20]

Recently, § 2-318 was involved in litigation in the courts of Connecti-

[17] 8 Pa. Chest. 375 (1959).

[18] 191 Pa. Super 422, 156 A. 2d 568 (1959). *Accord:* Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa. 1961).

[19] 13 Pa. D. & C. 2d 14 (1957).

[20] For other cases limiting the applicability of § 2-318 to the buyer's household and guests, see: Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa. 1961); Adams v. Schieb, 75 Pa. Dauph. 158 (1961). Sullivan v. H.P. Hood & Sons, Inc., 341 Mass. 216, 168 N.E. 2d 80.

cut in a case where a college cook who was injured by deleterious substances contained in a bar of soap purchased by her employer from a retailer was denied recovery because the court felt that the words "all the members of the buyer's household" would not include the plaintiff who was an "employee" since the statute did not say "employees."[21]

The status of privity requirement as enunciated in the decisions of the Illinois courts reflects the view of the thirty-nine other states which still adhere to the "general rule" with its plethora of exceptions. For example, a plaintiff who bought seed from a retailer was denied recovery from the manufacturer when it later was shown that the seed was adulterated because "a manufacturer, under Illinois law, is not responsible in damages to a person with whom it has no contractual relationship, and is not in privity. . . ."[22]

However, the Illinois courts recognize the well-known exceptions to the privity requirement where the product is inherently[23] or imminently[24] dangerous, where the product is food for human consumption[25] or where the manufacturer fraudulently misrepresents his product.[26]

The Uniform Commercial Code became law in Illinois on July 1, 1962. There has been, to date, no case in which § 2-318 has been involved. However, it seems clear that § 2-318 will have the effect of only adding one more exception to the privity requirement where the person injured is a guest or member of the household of the buyer. The Illinois Uniform State Law Commission reinforces this view by stating: "The Illinois cases are in accord with this section."[27] In support of this view the Commission cites four Illinois cases, the first is an imminently dangerous product case[28] and the other three are food cases.[29] Therefore, it is clear that Illinois will not hold § 2-318 as abolishing privity in manufacturers' liability, but will consider it as grafting onto the "general rule" another exception.

[21] Duont v. Axton-Cross Co., 19 Conn. Supp. 188, 110 A. 2d 647 (1954).

[22] Albin v. Illinois Crop Improvement Ass'n., 30 Ill. App. 2d 283, 174 N.E. 2d 697, 699 (1961).

[23] Watts v. Bacon & Van Buskirk Glass Co., 18 Ill. App. 2d 226, 163 N.E. 2d 425 (1959).

[24] Biller v. Allis-Chalmers Mfg. Co., 34 Ill. App. 2d 47, 180 N.E. 2d 46 (1962).

[25] Haut v. Kleene, 320 Ill. App. 273, 50 N.E. 2d 855 (1943).

[26] Day v. Barber-Colman Co., 10 Ill. App. 2d 494, 135 N.E. 2d 231 (1956).

[27] ILLINOIS ANNOTATION TO THE UNIFORM COMMERCIAL CODE, p. 57.

[28] Lindroth v. Walgreen, 329 Ill. App. 105, 67 N.E. 2d 595 (1946), but see Lindroth v. Walgreen, 388 Ill. App. 364, 87 N.E. 2d 307 (1949); affd. 407 Ill. 121, 94 N.E. 2d 847 (1950).

[29] Blarjeske v. Thompson's Restaurant Co., 325 Ill. App. 189, 59 N.E. 2d 320 (1945); Haut v. Kleene, 320 Ill. App. 273, 50 N.E. 2d 855 (1943); Welter v. Bowman Dairy Co., 318 Ill. App. 305, 47 N.E. 2d 739 (1943).

The dictum in a 19th century English case which formulated the requirement of privity in manufacturers' liability is still followed in forty states today. This "general rule" is slowly being eroded away by numerous exceptions which, in truth, have become of more universal application than the rule itself; so that, it is only in the rare instance that plaintiffs are unable to fit the facts of their particular claim into the outstretched hands of an exception.

The Uniform Commercial Code has not been able to alleviate this problem with § 2-318. On the contrary, it has added to the confusion in this field by adding onto the privity rule still another exception. Although the purpose of § 2-318 was not to enlarge or restrict the developing case law on manufacturers' liability, it has resulted in an affirmance of the "general rule" in the states which have not repudiated the privity requirement. It thus becomes clear, once again, that the requirement of privity in manufacturers' liability, which was fostered by judicial legislation, can only, in the last analysis, be abolished by judicial legislation. No state legislature, no matter how broad and sweeping its laws may appear to be, can ever hope to abolish a doctrine so firmly ingrained in the fabric of the courts that only they themselves can expunge it.